FH [redacted]

# STATE OF WISCONSIN
## Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

CWA/154861

**PRELIMINARY RECITALS**

Pursuant to a petition filed January 16, 2014, under Wis. Admin. Code §HA 3.03, to review a decision by the Kenosha County Human Service Department in regard to Medical Assistance (MA), a telephonic hearing was held on February 27, 2014.

The issue for determination is whether the petitioner is entitled to any refund of a MA spend down.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Karen Mayer and Kristin Walter
Kenosha County Human Service Department
8600 Sheridan Road
Kenosha, WI 53143

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Kenosha County.

2. In January 2012 the petitioner, by way of her power of attorney (POA), contacted the County Aging and Disability Resource Center (ADRC) of Kenosha County to discuss options for enrolling in MA.

3. On January 25, 2012 the POA provided to the agency the financial information that is necessary for petitioner to apply for MA. This included, in relevant part, an award letter from the Veteran's Administration (VA) stating petitioner's VA benefit. The POA signed a Declaration of Income and Assets and State Residency form attesting to the income, asset and expense information listed on the form. See Exhibit A.

4. At the January 25 meeting, the ADRC worker asked the POA to call the VA to find out if there was any Aid and Attendance (A&A) benefit within the VA benefit.

5. On February 8, 2012 the POA contacted the VA and was told that one-third of the VA benefit was for A&A. On that same date the POA contacted the ADRC worker and reported that information. The worker made a notation of that information on the Declaration of Income and Assets and State Residency form. See Exhibit A.

6. On February 20, 2012 the petitioner completed an application for MA. Exhibit B. That application was denied due to being over the asset limit and was not appealed.

7. On May 2, 2012 petitioner again applied for MA. That application was approved and petitioner was opened for MA-Family Care. She was notified of that decision in a notice dated May 3, 2012. Exhibits D and I. That notice also told petitioner that she had to pay a "spend down" of $1546.33 to remain MA-eligible as of May 7, 2012.

8. In June 2012 the POA contacted the agency to close petitioner's case. The agency did so and issued a notice to her that her MA was closed accordingly. See Exhibit 8.

9. In July 2012 the POA contacted the agency again to reopen petitioner's MA. As her case had not been closed for 30 days, her MA case was reopened for MA-Community Waivers. She was notified of that decision in a notice dated July 19, 2012. Exhibits E and I. That notice also told petitioner that she had to pay a "spend down" to remain MA-eligible effective August 1, 2012.

10. Petitioner paid her spend downs from at least August 1, 2012 through January 1, 2014. See Exhibit J showing the amounts vary between $1546.33 and $1614.33. For various reasons that spend down changed over that time period, such as increases in Social Security payments and health insurance changes. Petitioner did not appeal any of the notices she was given to advise her of the various changes in her spend down.

11. On December 16, 2013 the agency issued a decision to petitioner stating that effective January 1, 2014 her spend down increased. Exhibit 21. On December 18, 2013 the POA emailed the worker on the case to inquire as to the reason for the increase. Exhibit F. There is no evidence that the worker responded. On December 30, 2013 the POA again emailed the worker to advise of an increase in petitioner's renter's insurance and to question the determination of the spend down. Exhibit G. The worker responded that she would update petitioner's file. Id.

12. January 16, 2014 the POA filed an appeal which is the subject of this decision.

13. On January 23, 2014 the POA contacted the agency to again inquire about the increase in the spend down.

14. On January 24, 2014 the agency contacted the VA office to inquire about petitioner's A&A. Confirmation was given that she receives A&A. Petitioner's MA eligibility was redetermined for

January 2014. On January 27, 2014 the agency issued a notice to petitioner stating that her spend down decreased to $259.34.

## DISCUSSION

The first thing to address is the issue of timeliness. The agency argues that because petitioner did not appeal any of the notices advising her of the spend downs, that her attempts to argue their validity now are untimely and that this administrative law judge is without jurisdiction to hear them. It is true that I can only hear cases on the merits if there is jurisdiction to do so. There is no jurisdiction if a hearing request is untimely as an appeal of a negative action by a county agency concerning AFDC or MA must be filed within 45 days of the date of the action. Wis. Stat. §49.45(5); Income Maintenance Manual, §3.2.2. However, when a notice is misleading, confusing, and unintelligible it is inadequate. See, Dilda v. Quern, 612 F.2d. 1055, at 1057 (7th Cir. 1980), stating that:

> this court has held that the failure of state authorities to provide public assistance recipients with detailed notice, including "a breakdown of income and deductions so that the recipients could determine the accuracy of the computations" may be a denial of due process (citation omitted).

See also, Ortiz v. Eichler, 616 F.Supp. 1046, at 1061-62 (D.Del.1985). The notices advising petitioner as to her spend down are inadequate for her to have known that this spend down was in any way inaccurate. Rather, these are positive notices telling her she is MA-eligible. There is no way for someone to read these notices and determine how the spend down was calculated. There similarly is no way for anyone to know that A&A was considered or not in that determination. Accordingly, I find these notices inadequate to advise her of any negative action taken here, and therefore find the appeal is timely as a matter of law.

A person is eligible for MA if s/he meets all MA non-financial and financial requirements. See Wis. Stat. §48.45 and *MA Handbook*, §1.1.2, available online at http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm. There is no dispute here that of the things that the MA agency must consider in determining MA eligibility, income is one of them. See also *MA Handbook* §15.1. There is also no dispute here that petitioner provided verification of that income. The problem arises here because the verification of the income at issue here – the VA pension – did not state that there was an A&A benefit within that VA benefit. See Exhibit 3.

In determining MA eligibility the agency is required to verify certain information provided. *MA Handbook* §20.1.1. To that end, the agency is provided with the following policy:

> To verify means to establish the accuracy of verbal or written statements made about a group's circumstances. Documentation is a method by which you accomplish verification.
>
> You will ask the questions needed to determine eligibility, but only need to verify mandatory and questionable items.

*Id*.

In verifying income, the agency is required to verify all sources of non-exempt income for MA applicants. *MA Handbook* §20.3.8. The agency is to verify income using the automated data exchanges, or if current income information is not available through a data exchange, the applicant is required to supply

verification/documentation of their earned and unearned income[1]. *Id.* The agency is also required to assist the applicant/member in obtaining verification if s/he has difficulty in obtaining it. *Id.* There is no information in the record to show that the VA benefit (with A&A or not) is available through data exchanges available to the agency.

Addtionally, the agency is told *when* to verify information:

> Verify mandatory and questionable items at application, review, person addition or deletion, or when there is a change in circumstance that affects eligibility or benefit level. Do not reverify one time only verification items.
>
> **Exception:** Veterans benefits, including allowances for Aid and Attendance, Housebound, and Unusual Medical Expenses usually increase only once a year, in January. If an IM agency verifies the January veterans benefit increase, it does not have to re-verify the veteran benefit income at the time of the next scheduled eligibility review, which occurs later in that same year. If another change in the veterans benefit does occur between January and the next scheduled eligibility review, that income change will have to be verified. This exception is being adopted to reduce the verification workload for both the IM agency and Veterans Administration staff, who routinely pursue and provide veterans benefit income verification every January.

*MA Handbook*, §20.7.

The agency is also told to verify information if what they have is questionable. *MA Handbook***,** §20.4. Information is questionable when:

1. There are inconsistencies in the group's oral or written statements.
2. There are inconsistencies between the group's claims and collateral contacts, documents, or prior records.
3. The member or his/her representative is unsure of the accuracy of his/her own statements.
4. The member has been convicted of Medicaid recipient fraud or has legally acknowledged his/her guilt of recipient fraud. Do not require a member to provide verification for the sole reason that they have acknowledged or been convicted of fraud in any other public assistance or employment program.
5. The member is a minor who reports that s/he is living alone. This does not apply to minors applying solely for FPW.
6. Unclear or vague (i.e., information provided, but not clear).

*Id.*

The only information in the record about what was requested by the agency about A&A was at the time of the initial meeting in January 2012 when the POA met with the ADRC of Kenosha County to discuss

[1] Here, I must note that in addition to this onus on the petitioner to verify, other portions of the *MA Handbook* echo that sentiment. For the MA SeniorCare program, policy states that the "applicant should check with the Veterans Administration at 1-[redacted] to determine if any portion of the payment is considered an allowance for unusual medical expenses, aid and attendance or housebound allowance." *MA Handbook,* §33.6.8.4. These requirements were met by the POA. The agency's own records show that on February 8, 2012 the POA contacted the ADRC worker and reported the A&A information. See Exhibit A. There is no policy stating that the POA is somehow required to provide written documentation of the A&A, unless, perhaps if she were requested to do so in writing.

options for enrolling in MA. At that time there was apparently only a conversation and a verbal request for the POA to get the A&A information. The agency's own records show that on February 8, 2012 the POA contacted the ADRC worker and reported that information. See Exhibit A. The worker made a notation of that information on the Declaration of Income and Assets and State Residency form. Id. Apparently this notation was overlooked when she actually applied for MA and no credit was ever given for the A&A. There is no record of any written request for verification of the A&A, nor record to show that the POA was advised that the A&A would impact eligibility determinations. Rather, when the applications were run, it appears that the agency simply used the verification of income that the POA provided (again, no evidence of any written request for verification of *this*). The agency's date stamp shows that this income verification was received on January 30, 2012, a mere 5 days after the initial meeting, and prior to any application. Exhibit 3. However, the agency used *this* January verification to process the May 2, 2012 application for her income, but failed to use the information on the Declaration of Income and Assets and State Residency wherein the worker made several notations about the A&A. See Exhibit A.

This oversight impacts how the agency calculated the petitioner's spend down. In determining income, the agency has a list of the types of income that should be disregarded. See *MA Handbook* §15.3. To disregard income means "do not count." *Id.* The disregarded income list includes VA benefits and provides:

> Disregard the following VA allowances:
> 1. Unusual medical expenses that are received by a veteran, their surviving spouse, or dependent.
> 2. Aid and attendance and housebound allowances received by veterans, spouses of disabled veterans and surviving spouses.
>
> Unusual medical expenses, aid and attendance, and housebound allowances for institutionalized and community waiver cases, in eligibility and post-eligibility determinations, except for residents of the State Veterans Homes at King or Union Grove (see 15.3.26.1 Residents of a State Veterans Home).

> **Example 3:** Jack is a single veteran living in his home. He is disabled (as determined by the VA) and receives VA pension benefits in the amount of $1,450 per month. Because he requires assistance with his daily living tasks, Jack receives an aid and attendance allowance which is part of the $1,450. The aid and attendance allowance that Jack receives is $589 per month. Aid and attendance is disregarded income.
>
> $1,450 VA pension
> - 589 aid and attendance allowance (disregarded income)
> **$ 861 budgetable income**

> **Example 4:** Donald is a married veteran living with his wife and two children. He is disabled (as determined by the VA) and receives VA compensation benefits in the amount of $2,600 per month. He does not receive aid and attendance, housebound, or unusual medical expense allowances.
>
> The full $2,600 is budgetable income to the household.

*MA Handbook* §15.3.26.

Accordingly, I find that the petitioner's A&A should have been disregarded when determining the petitioner's net income and spend down. The agency cannot reasonably argue that the POA should have

known that she needed to provide verification of the A&A beyond what she did. To do so would be to essentially require that any applicant for MA know that certain types of income could be disregarded, or require them to essentially perform the tasks/have the knowledge of the MA program that workers at the MA agency would have. The agency also cannot reasonably argue that anytime a MA participant gets a notice of a spend down, that they should appeal that notice as a negative action. As such, I find that the agency failed to meet its obligations under Wis. Stats. §49.45(2)(a)1 which requires the agency to exercise responsibility relating to fiscal matters and the eligibility for benefits under standards set forth in §§49.46 to 49.471. Therefore, I am remanding the matter to the agency to reimburse petitioner any spend down overages she paid for August 1, 2012 through January 1, 2014.

## CONCLUSIONS OF LAW

1. The agency calculated the petitioner's spend down incorrectly.

2. Petitioner overpaid her spend down from August 1, 2012 through January 1, 2014.

**THEREFORE, it is ORDERED**

That the matter be remanded to the agency with instructions to redetermine petitioner's correct spend down from August 1, 2012 through January 1, 2014, using the correct A&A disregard, and to reimburse petitioner any spend down overages she paid during that time period. The agency shall take this action within 10 days of this decision.

## REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

## APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee, Wisconsin, this 31st day of March, 2014

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

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The preceding decision was sent to the following parties on March 31, 2014.

Kenosha County Human Service Department
Bureau of Long-Term Support